IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 33665

Joseph E. Baker, *et al.*, Appellants
vs.
Consolidated Rail Corporation, and American Premier Underwriters, Inc., Appellees

and

Charles S. Adams, *et al.*, Appellants
Herbert J. Adams, *et al.*, Appellants
Jerry M. Abbott, *et al.*, Appellants
Peggy Tackett, Administratrix of the Estate of Walk Tackett, Deceased, Appellant
vs.
CSX Transportation, Inc., Appellee

and

Charles C. Albright, *et al.*, Appellants
Paul D. Anthony, *et al.*, Appellants
vs.
Norfolk Southern Railway Company, Appellee

Appeal from the Circuit Court of Kanawha County, West Virginia
The Honorable Arthur M. Recht, Judge
Civil Action No.: 02-C-9500

BRIEF OF APPELLEES CSX TRANSPORTATION, INC. AND NORFOLK SOUTHERN RAILWAY COMPANY

Respectfully submitted by:

Luke A. Lafferre
West Virginia State Bar No. 2122
Alicia A. Deligne
West Virginia State Bar No. 10343
HUDDLESTON BOLEN LLP

611 Third Avenue
P.O. Box 2185
Huntington, WV 25722-2185
(304) 529-6181
(304) 522-4312 (fax)

Counsel for Appellees,
CSX Transportation, Inc. and
Norfolk Southern Railway Company

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I. INTRODUCTION

Appellants are more than one thousand railroad employees who allege injurious exposure to respirable deleterious substances, including asbestos, during the course of their employment with Appellees. The parties have stipulated that Appellants and Appellees are all non-residents of the State of West Virginia and Appellants' alleged causes of action arose outside of the State of West Virginia. Appellants' mass Complaints were filed in several counties in West Virginia seeking damages under the Federal Employer's Liability Act, 45 U.S.C. §51, *et seq.*. Their cases later were transferred to the West Virginia Asbestos Mass Litigation Panel.

Appellees CSX Transportation, Inc. ("CSXT") and Norfolk Southern Railway Company ("NSRC") filed Motions to Dismiss pursuant to West Virginia Code § 56-1-1(c)(2003) (the "Non-Resident Venue Act"), urging that venue over foreign claims between exclusively non-resident parties is improper under the statute and the resulting procedural dismissal, which does not infringe any right to re-file in an appropriate jurisdiction, offends no federal or state constitutional protection. The Honorable Arthur M. Recht agreed, and granted the Appellees' Motions and consolidated these matters for appeal by order entered December 14, 2006. R. 173, Dismissal Order (December 14, 2006).[1]

[1] Citations to the Record are reflected by the Reproduced Record Index Number ("R. __") and a specific citation to the document cited.

II. STANDARD OF REVIEW

> A trial court's ruling on a motion to dismiss is reviewed under a de novo standard. *Kopelman and Associates v. Collins*, 196 W.Va. 489, 492, 473 S. E. 2d 910, 913 (1996). Constitutional challenges relating to a statute are reviewed pursuant to a de novo standard of review. *West Virginia ex rel. Citizens Action Group v. West Virginia Economic Development Grant Committee*, 213 W.Va. 255, 261-262, 580 S. E. 2d 869, 875-876 [2003]. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review." Syllabus Point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (W.Va. 1995).

Morris v. Crown Equipment, 633 S.E.2d 292, 297 (W.Va. 2006).[2]

[2] The Court has also applied an abuse-of-discretion standard in reviewing a trial court's ruling on a motion to dismiss for improper venue. *See, e.g.*, Syl. pt. 1, *United Bank, Inc. v. Blosser*, 624 S.E.2d 815 (W.Va. 2005).

III. STATEMENT OF THE FACTS

Appellants are more than one thousand foreign railroad employees who allege injurious exposure to asbestos, silica, fibrosis-inducing, and carcinogenic materials while working for Appellees outside the State of West Virginia. They seek reversal of the order dismissing their individual claims for lack of venue. Appellants stipulated below that they are non-residents[3], that Appellees are non-residents and that their causes of action all arose outside of West Virginia.

> The parties agree that the cases were brought under the Federal Employer's Liability Act, 45 U.S.C. §51, et seq. (FELA). The parties further agree that these cases were filed after June 4, 2003, the effective date of the non-resident venue provisions of West Virginia Code §56-1-1, making them subject to those provisions. In addition, the parties agreed that certain of the Plaintiffs in these actions are not residents of West Virginia, that neither all nor a substantial part of the acts or omissions giving rise to the certain Plaintiffs' claims asserted in this case occurred in this State, and that at the time the case was filed there was no impediment to the filing of these claims in cases in venues other than the State of West Virginia.

R. 173, Dismissal Order (December 14, 2006).[4]

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[3] In some of the Complaints, there were a few non-resident plaintiffs who had worked for a Respondent in West Virginia, meaning that their causes of action arguably arose in West Virginia, and those plaintiffs' claims were omitted from the operation of the December 14, 2006 dismissal order. R. 173. The cases subject to the dismissal order were detailed in Exhibits to that order.

[4] The FELA establishes jurisdiction in federal courts and addresses venue when an action is commenced there. It also provides for the exercise of concurrent jurisdiction in State courts:

> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

45 U.S.C. § 56 (emphasis added); *see also Miles v. Illinois Cent. R.R. Co.*, 315 U.S. 698 (1942); *NSRC v. Maynard*, 437 S.E.2d 277 (W.Va. 1993). Importantly, when a FELA plaintiff brings his or her action in state court, that State's venue law governs. *See Miles*, 315 U.S. 698; *see also Rodriguez v. Grand Trunk Western R. Co.*, 328 N.W.2d 89 (Mich.App. 1982)(state venue law applies to actions brought under the FELA); *Garland v. Seaboard Coastline R. Co.*, 658 S.W.2d 528 (Tenn. 1983)(same); *Hopmann v. Southern Pacific Transp. Co.*, 581 S.W.2d 532 (Tex.App. 1979), *cert. denied*, 444 U.S. 870 (same); *James v. Nashville, C. & St. L. Ry.*, 221

Similar foreign FELA cases, represented by the same plaintiffs' law firm, had also been filed against non-West Virginia residents Consolidated Rail Corporation and American Premier Underwriters. Those cases present similar dispositive facts and common venue issues. It was thus agreed by counsel that the lower court's ruling granting CSXT's and NSRC's Motions to Dismiss should be applied to them as well. Thus, the Dismissal Order of December 14, 2006 was made applicable to all of these Appellants, dismissing their cases under the Non-Resident Venue Act, West Virginia Code § 56-1-1(c) (2003). *See* R. 173, Dismissal Order (December 14, 2006).

IV. LAW AND ARGUMENT

A. THE TRIAL COURT'S DISMISSAL OF APPELLANTS' CLAIMS DID NOT VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE UNITED STATES CONSTITUTION, ART. IV, SEC. 2.

Appellants acknowledge that the trial court properly applied section 56-1-1(c)(2003). Hence, there is no debate that dismissal was the proper result under statute. Instead, Appellants contend that application of the statute under these circumstances violated the Privileges and Immunities Clause of the United States Constitution, Art. IV, Sec. 2. W.Va. Code § 56-1-1(c)(2003) provides:

> Effective for actions filed after the effective date of this section, a nonresident of the state may not bring an action in a court of this state unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state: Provided, that unless barred by the statute of limitations or otherwise time barred in the state where the action arose, a nonresident of this state may file an action in state court in this state if the nonresident cannot obtain jurisdiction in either federal or state court against the defendant in the state where the action arose. A nonresident bringing such an action in this state

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S.W.2d 449 (Ky. 1949)(same); *Ledbetter v. Sanford*, 205 S.W.2d 464 (Ark. 1947). Appellees acknowledge the jurisdictional power of West Virginia's courts to adjudicate an FELA cause of action, which is an issue separate and apart from venue.

> shall be required to establish, by filing an affidavit with the complaint for consideration by the court, that such action cannot be maintained in the state where the action arose due to lack of any legal basis to obtain personal jurisdiction over the defendant.

W.Va. Code § 56-1-1(c)(2003).[5]

1. This Court's Holding in *Morris v. Crown Equipment* Does Not Apply and Should Not be Extended to Non-Resident Defendants.

It is a well-established principle in Constitutional law that a statute may be constitutionally invalid as applied to one set of facts but valid as applied to another. *See Kolvek v. Napple*, 212 S.E.2d 614 (W.Va. 1975). It is also axiomatic that statutes are presumed to be constitutional and will be construed to avoid conflict with the Constitution. *Farley v. Graney*, 119 S.E.2d 883, 839-40 (W.Va. 1960). When addressing a claim that legislation is unconstitutional, this Court employs the following analysis:

> [W]e start with the fundamental precept that the powers of the legislature are almost plenary: "The Constitution of West Virginia being a restriction of power rather than a grant thereof, the legislature has the authority to enact any measure not inhibited thereby." Syl. Pt. 1, *Foster v. Cooper,* 186 S.E.2d 837 (W.Va. 1972). Moreover, in light of the constitutionally required principle of the separation of powers among the judicial, legislative and executive branches of state government, W.Va.Const. art. V, § 1, courts ordinarily presume that legislation is constitutional, and the negation of legislative power must be shown clearly....

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[5] After these cases were dismissed, West Virginia Code §56-1-1(c) (2003) was repealed in 2007. The legislature replaced the Non-Resident Venue Act portion of the statute with a codified *forum non conveniens* procedure. *See* W.Va. Code § 56-1-1a (2007). Appellants have wisely chosen not to argue that the new statute somehow applies retroactively. To be sure, no part of this 2007 amendment expresses an intent for retroactive application. That legislative silence coupled with the well-established presumption in favor of prospective application would make such position untenable. W.Va. Code § 2-2-10(bb)(2007) ("A statute is presumed to be prospective in its operation unless expressly made retrospective."); *see also State v. Bannister*, 250 S.E.2d 53 (W.Va. 1978) (stating that the general rule in West Virginia is that "there is a presumption that a statute is intended to operate prospectively, unless it appears, by clear, strong and imperative words or by necessary implication that the Legislature intended to give the statute retroactive force and effect"); *Findley v. State Farm Mut. Auto. Ins. Co.*, 576 S.E.2d 807 (W.Va. 2002), *cert. den.* 539 U.S. 942 (2003) (noting that where "'a new . . . provision would, if applied in a pending case, attach a new legal consequence to a completed event, then it will not be applied in that case unless the Legislature has made clear its intention that it shall apply" (internal quotation omitted)); *see also Landgraft v. Usi Film Prods.*, 511 U.S. 244 (1994).

> 'In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. [*W.Va. Const.* art. V, § 1.] Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt.' Syl. pt. 1, *State ex rel. Appalachian Power Co. v. Gainer,* 143 S.E.2d 351 (W.Va. 1965). Syl. pt. 2, *West Virginia Public Employees Retirement System v. Dodd,* 396 S.E.2d 725 (W.Va. 1990). *Accord,* syl. pt. 1, *Lewis v. Canaan Valley Resorts, Inc.,* 408 S.E.2d 634 (W.Va. 1991).

Randall v. Fairmont City Police Dept., 412 S.E.2d 737 (W.Va. 1991) (footnote omitted); *see also Farley v. Graney*, 119 S.E.2d 883, 839-40 (W.Va. 1960).

Appellants cite *Morris v. Crown Equipment*, 633 S.E.2d 292 (W.Va. 2006)[6], for the proposition that W.Va. Code § 56-1-1(c)(2003) is unconstitutional as applied to their claims because it violates the Privileges and Immunities Clause. Appellees contend *Morris v. Crown*'s Privileges and Immunities Clause holding should not be read as applying to situations where, as here, there is no resident defendant.

The Plaintiff in *Morris* was a citizen of Virginia who was injured while operating a forklift at his place of employment in Virginia. *Id.* at 294. The Plaintiff brought a products liability suit against Jefferds, his employer, and Crown Equipment, the forklift manufacturer, in Kanawha County, West Virginia where Jefferds had its principal place of business. *Id.* The circuit court granted Defendants' motions to dismiss pursuant to W.Va. Code § 56-1-1

[6] Judge Recht found that *Morris* was no impediment to dismissal here, , as he noted at page 2 in the December 14, 2006 Dismissal Order from which Appellants appeal. R. 173.

(2003), which Plaintiff argued was unconstitutional under the Privileges and Immunities Clause of the United States Constitution, Art. IV, Sec. 2. *Id.* at 296-97.

On appeal, this Court found that **W. Va. Code 56-1-1(c) did not apply to non-resident defendants.** Because one of the defendants in *Morris* was a West Virginia resident, this Court found the statute **unconstitutional as applied to the facts presented in *Morris*.** *Id.* at 300. Syllabus Point 2 of *Morris* provides:

> 2. Under the Privileges and Immunities Clause of the United States Constitution, Art. IV., Sec. 2, the provision of W.Va. Code 56-1-1(c) [2003] **do not apply to civil actions filed against West Virginia citizens and residents.**

Id. (emphasis added).

The opinion further provides,

> A reading or application of W.Va. Code 56-1-1(c) [2003] that would categorically immunize a West Virginia defendant like Jefferds from suit in West Virginia by a nonresident would contravene the constitutionally permissible scope of the venue statutes in the interstate context.

Id.

Thus, by its own terms, *Morris* is limited to its facts and has no application to the present foreign cases filed against exclusively non-resident defendants. *Morris* found the statute unconstitutional as it applied in *that* case. It did not hold the statute unconstitutional on its face under all conceivable circumstances. Indeed, had *Morris* intended its Privileges and Immunities Clause holding to extend to exclusively non-resident defendants, the "Venue-Giving Defendant" section of the opinion would have been completely unnecessary. *See Morris*, 633 S.E.2d at 301. Instead, with the presence of a "Venue-Giving Defendant" its linchpin, the constitutional line contemplated by *Morris* is not, as found by Judge Recht,

crossed under the circumstances here. Nor should this Court extend *Morris* to apply *in toto* even in the absence of a "Venue-Giving Defendant." To do so would usurp the role of the legislature and overturn its express policy preferences regarding venue law.

> To be clear, the West Virginia Legislature is the paramount authority for deciding and resolving policy issues pertaining to venue matters. n6 Once the Legislature indicates its preference by the enactment of a statute, the Court's role is limited. Our duty is to interpret the statute, not to expand or enlarge upon it. *State ex rel. Frazier v. Meadows, 193 W. Va. 20, 23-24, 454 S.E.2d 65, 68-69 (1994).* More significantly, any subsequent policy changes must come from the Legislature itself and, in the absence of constitutional or statutory authority to the contrary, this Court has no blanket power to recast the statute to meet its fancy. *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., W. Va.___ , 461 S.E.2d 516 (1995).*

Riffle, 464 S.E.2d at 768. (footnote omitted).

This Court should observe the legislature's express policy preferences and refuse to extend the application of *Morris* to cases like the instant case, brought by non-resident plaintiffs asserting causes of action arising elsewhere against exclusively non-resident defendants.

Legislative intent aside, extension of *Morris* to apply here would be in conflict with the United States Supreme Court's decisions in *Douglas v. New York, N.H. & H.R.R. Co.*, 279 U.S. 377 (1929) and *Missouri ex rel. Southern Ry. Co. v. Mayfield,* 340 U.S. 1 (1950). Appellees submit that to the extent *Morris* is read to apply here, or extended to apply here, it should be overruled as being contrary to binding U.S. Supreme Court precedent in *Douglas* and *Mayfield*. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this [United States Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should

follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

2. This Court has Determined that the Privileges and Immunities Clause of the United States Constitution does not Prevent West Virginia from Enforcing the State's Venue Laws in Foreign Litigation Brought by Non-residents.

This Court has written at length on the subject of venue laws affecting foreign litigation brought in this state by non-residents, and has explained that venue law can be applied permissibly under the West Virginia and United States Constitutions to rid the State of West Virginia of burdensome litigation that can be and should have been brought elsewhere.

In *Gardner v. Norfolk & Western Railway Company*, 372 S.E.2d 786 (1988), *cert. denied*, 489 U.S. 1016 (1989), *reversed in part by Norfolk & W. Ry. v. Tsapis*, 400 S.E.2d 239 (W.Va. 1990), this Court discussed the Privileges and Immunities clause of the U.S. Constitution, Article IV, § 2, clause 1 in connection with a sought-after limitation on non-West Virginia residents' ability to bring foreign litigation in West Virginia courts against non-resident defendants.

> The privileges-and-immunities clause is set forth in the *U.S. Const.* art IV, § 2, cl. 1: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." This clause by its terms relates to protecting persons in their capacity as citizens of other states. In comparison, *U.S. Const.* amend. XIV, § 1 by its terms relates to protecting persons in their capacity as citizens of this nation: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States[.]"
>
> Due to our disposition of this case in favor of the nonresident, as well as West Virginia resident, plaintiffs on the ground that *forum non conveniens* and *W.Va. Code, 56-9-1* [1939] do not apply to FELA actions brought in the courts of this State, this Court need not determine whether the trial court's ruling, in favor of the West Virginia resident plaintiffs and adverse to the nonresident plaintiffs, is violative of the privileges-and-immunities clause. The trial court did not explain on the record why the actions of the West Virginia resident

plaintiffs, none of whom resided in the forum county, Brooke County, West Virginia, had a "reasonable relationship" with Brooke County, while the actions of the plaintiffs residing outside West Virginia did not have such a relationship. The ruling may be impermissibly discriminatory against nonresidents of this State.

Douglas [v. New York, N.H. & H.R.R. Co., 279 U.S. 377 (1929)] and *[Missouri ex rel. Southern Ry. Co. v.] Mayfield, [340 U.S. 1 (1950)]* allow a state to prefer its residents in access to the courts of the state. We need not decide in the present case if *Douglas* and *Mayfield* have been affected by recent opinions of the Supreme Court of the United States on the privileges-and-immunities clause, such as *Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 105 S. Ct. 1272, 84 L. Ed. 2d 205 (1985),* involving residency requirements for the practice of law. *Piper* holds that the privileges-and-immunities clause "does not preclude discrimination against nonresidents [of the state] where (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." *Id. at 284, 105 S. Ct. at 1278, 84 L. Ed. 2d at 213. See also Sargus v. West Virginia Board of Law Examiners,___ W.Va. , 294 S.E.2d 440 (1982)* (residency requirements for admission to bar examination violates privileges-and-immunities clause; insufficient justification offered for discrimination).

Gardner, 372 S.E.2d at 791 n. 8.

The Court in *Gardner* actually considered the applicability of the "open courts" provision of the West Virginia Constitution:

Based upon the foregoing discussion, we recognize that federal law does not require this Court to reject or accept the common-law principle of forum non conveniens in FELA actions. **We also recognize that our "access-to-courts" or "open courts" constitutional provision, W.Va. Const. art. III, § 17, is not an absolute bar to our adoption of the common-law principle of forum non conveniens.** Nonetheless, this Court holds that the common-law principle of forum non conveniens and the similar state statute on removal of civil proceedings, W.Va. Code, 56-9-1 [1939], are not applicable to actions brought in the courts of this State under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, as amended, in light of the strong policy favoring the plaintiffs' choice of forum in such cases and in light of the strong policy of W.Va. Const. art. III, § 17 providing access to the courts of this State. This identical approach has been taken elsewhere. *Labella v. Burlington Northern, Inc.*, 182 Mont. 202, 595 P.2d 1184 (1979), followed in *Bevacqua v. Burlington Northern, Inc.*, 183 Mont. 237, 598 P.2d 1124 (1979), and *State ex*

rel. Burlington N.R.R. v. District Court, 229 Mont. 325, 746 P.2d 1077 (1987). See generally annotation, Power of State or State Court to Decline Jurisdiction of Action Under Federal Employers' Liability Act, 43 A.L.R.2d 774 (1955 and Later Case Service); cf. annotation, Forum Non Conveniens: Circumstances Justifying State Court's Refusal to Take Jurisdiction of Federal Employers' Liability Act Proceeding, 60 A.L.R.3d 964 (1974) (collecting cases assuming the power to invoke the principle of forum non conveniens in FELA actions and analyzing the circumstances justifying, or not justifying, dismissals of FELA actions under such principle).

Our decision is a narrow one. Our holding herein does not deny or recognize the applicability of the common-law principle of forum non conveniens to cases not brought under the Federal Employers' Liability Act.

Gardner, 372 S.E.2d at 793 (emphasis added) (footnote omitted).

Two years later, in *Norfolk & W. Ry. v. Tsapis*, 400 S.E.2d 239 (W.Va. 1990), *reversed in part on other grounds by State ex. rel. Riffle v. Ranson*, 464 S.E.2d 763 (W.Va. 1995), this Court decided that the Privileges and Immunities Clause is *no impediment* to the rejection of foreign litigation brought by non-resident plaintiffs:

In *Gardner*, we traced in some detail the history of the FELA venue provisions. We also discussed the impact of several United States Supreme Court cases ...dealing with the interrelationship of the Privileges and Immunities Clause of the United States Constitution ...and the doctrine of *forum non conveniens*. In *Gardner*, we came to this conclusion regarding the availability of the doctrine in FELA cases:

> "Relying upon *Douglas [v. New York, N.H. & H.R.R. Co., 279 U.S. 377, 49 S. Ct. 355, 73 L. Ed. 747 (1929)]*, the *[Missouri ex rel. Southern Ry. Co. v.] Mayfield, [340 U.S. 1, 71 S. Ct. 1, 95 L. Ed. 3 (1950)]* court held that the states were not precluded from applying the principle of *forum non conveniens* to FELA actions merely because the FELA empowers state courts to entertain suits arising under it. Instead, 'according to its own notions of procedural policy, a State may reject, as it may accept, the doctrine [of forum non conveniens] for all causes of action begun in its courts.' *Id. at 3, 71 S. Ct. at 2, 95 L. Ed. at 7* (emphasis added)." W.Va. at__, 372 S.E.2d at 791. (Emphasis in original).

> A number of other courts have reached the same conclusion that the common law doctrine of *forum non conveniens* can be utilized to permit a court to deny access to its courts to nonresident plaintiffs in FELA cases in appropriate circumstances **without running afoul of the Privileges and Immunities Clause.**

Tsapis, 400 S.E.2d at 241-42 (footnotes and citations omitted) (emphasis added).

Appellants even concede that a State may limit access to its courts by non-residents:

> This is not to say that states are not permitted to discriminate in any manner against non-residents in the use of their court systems, since numerous rationale *(sic)* requirements such as the imposition of security for costs for non-residents have passed constitutional muster in the past, but only that a non-resident must be given access to the courts of a state "upon terms which in themselves are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens."

Brief of Appellant, at 9.

For this proposition, Appellants cite *Canadian Northern Ry. Co. v. Eggen*, 252 U.S. 553, 560 (1920), which held that Minnesota was permitted to prevent a North Dakota resident, allegedly injured in Canada, from litigating his case in Minnesota, a venue to which he had moved merely to take advantage of a longer statute of limitations period than any afforded him elsewhere. Appellants then assert:

> [T]he West Virginia statute at issue is not an additional but reasonable requirement that must be satisfied by a non-resident before he can access the courts, it is an outright and total exclusion of non-resident plaintiffs from the court system under the same circumstances in which resident plaintiffs are granted access. This is patently impermissible.

Brief of Appellant, at 13.

This assertion is unfounded. Appellants ignore the fact that **the statute in question is not an "absolute" or "categorical" prohibition of litigation** brought by non-West Virginia residents. For example, non-residents may litigate in West Virginia if "all or a substantial part of

the acts or omissions giving rise to the claim asserted occurred in this state." W.Va. Code § 56-1-1(c). Even if this requirement cannot be met by a non-resident litigant, the Non-Resident Venue Act nevertheless permits such plaintiffs who are otherwise foreclosed from litigating in West Virginia to litigate here if they can litigate nowhere else:

> Provided, That unless barred by the statute of limitations or otherwise time barred in the state where the action arose, **a nonresident of this state may file an action in state court in this state if the nonresident cannot obtain jurisdiction in either federal or state court against the defendant in the state where the action arose.**

W.Va. Code § 56-1-1(c) (emphasis added).

Thus, the Non-Resident Venue Act cannot fairly be described as constituting a "categorical" or "absolute" exclusion of non-resident litigants.

Appellants appear to view the statute in a vacuum, suggesting that because under the Non-Resident Venue Act alone there may be situations wherein the case of a non-resident plaintiff who cannot show that "all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state" will be dismissed *under the Act*, when the identical case of a West Virginia resident will not be dismissed *under the Act.* This does not mean that the case of the West Virginia resident will not be dismissed under another provision of West Virginia law, *e.g.* the *forum non conveniens* doctrine, for substantially the same reasons that the case of the non-resident was dismissed *under the Act.* Appellants provide no support for the proposition that the similar treatment of residents and non-residents required to show a lack of impermissible discrimination must occur in a single statute or provision of law.

Obviously, the operation of the Non-Resident Venue Act is akin to the application of the *forum non conveniens* doctrine to litigation in West Virginia that could have been brought

elsewhere. Under both the *forum non conveniens* doctrine and the Act, no factor, including that of non-residency, requires categorical exclusion from West Virginia courts.

After misrepresenting the statute as "an outright and total exclusion of non-resident plaintiffs," Appellants then purport to engage in a "multi-prong" analysis under the Privileges and Immunities Clause, *see* Brief of Appellant, at 13, even though this Court has already addressed this "analysis." As mentioned above, this Court in *Gardner* suggested that the United States Supreme Court's decisions in *Douglas v. New York, New Haven & Hartford Railroad Co.*, 279 U.S. 377 (1929), and *Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1 (1950), might have been affected adversely by the later case of *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), which is cited by Appellants in their Brief at page 12. However, the fact that in adopting the *forum non conveniens* doctrine in *Tsapis* this Court cited *Douglas* and *Mayfield* but not *Piper*, *see* 400 S.E.2d, at 241-42, shows its unstated conclusion that the *Piper* case was no impediment to the dismissal of foreign litigation brought by non-residents and that such dismissals do not offend the Privileges and Immunities Clause of the Constitution.

3. West Virginia has a Substantial Interest in Avoiding the Burdens of Foreign Litigation and W.Va. Code § 56-1-1(c) Bears a Substantial Relationship to this Objective.

This Court recognized in *Gardner*, 372 S.E.2d at 791 n. 8., that the United States Supreme Court in *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985) held that "the privileges-and-immunities clause 'does not preclude discrimination against nonresidents [of the state] where (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." *Gardner*, 372 S.E.2d at 791 n.8 (*quoting Piper*, 470 U.S. 274 (1985)). As more

fully set forth below, W. Va. Code § 56-1-1(c) (2003) passes constitutional muster because West Virginia certainly has a substantial interest in preventing nonresident FELA plaintiffs with no connection to the State from burdening West Virginia's judicial system with foreign litigation, and any apparent discrimination bears a substantial relationship to the obvious objective of the State in avoiding the burdens of foreign litigation. Furthermore, at least one court has held that a statute similar to § 56-1-1(c) passed constitutional muster under the Privileges and Immunities clause of the United States Constitution. *See Owens Corning v. Carter*, 991 S.W.2d 560 (Tex. 1999) (holding that § 71.052 of the Texas Civil Practice and Remedies Code, which contains provisions that require a court, on motion of a defendant, to dismiss any asbestos claim where the plaintiff was a non-resident when the claim arose, and the claim arose outside the state, did not violate the Privileges and Immunities Clause in Article IV of the United States Constitution).

Appellants rely on Justice Benjamin's concurring opinion in *Morris* to argue that "the West Virginia legislature failed to supply any rationale to support the existence of a substantial reason for the apparent discrimination in § 56-1-1(c)." Brief of Appellant, at 14. However, Appellants overlook the stated purpose of the statute, which is to "preserve West Virginia courts for West Virginians and for nonresidents who are injured in this state." S.B. 213, 2003 Sess. (W.Va. February 13, 2003), which is included in the Addendum as Exhibit A. Although the Legislature did not elaborate further, it can be inferred from the stated purpose that the statute was intended to address the burdens of foreign litigation.

Appellants then assert that "even if it could be assumed that the goal of the West Virginia Legislature in enacting W.Va. Code § 56-1-1(c)(2003) was to lessen the burden on the State's

judicial system," the State has not legitimized this goal because it has failed to "demonstrate that: 1) its court system is in fact overburdened; and 2) non-resident Plaintiffs are a 'peculiar source' of this overburdening." Brief of Appellant, at 15. Appellants suggest that the State of West Virginia has not "found" that foreign litigation generally and foreign asbestos litigation specifically is a problem for the West Virginia Court system. This is incorrect. The burden imposed by numerous suits filed by nonresidents against foreign corporations has long been recognized as a problem in this State. In fact, both this Court and the West Virginia Legislature have recognized the burdens foreign litigation imposes on the West Virginia judicial system.

In *State ex rel. Appalachian Power Co. v. MacQueen*, 479 S.E.2d 300 (W.Va. 1996), this Court dealt with asbestos defendants' objections to a plan for the trial of their cases. At the outset, this Court stated,

> Asbestos cases such as those we are now considering present a complex pattern of legal, social, and political issues that threaten to cripple the common law system of adjudication, if for no other reason by the sheer volume of cases. ... A recent study concluded that the disposition of all currently pending asbestos cases for both personal injury and property damages, if treated in the traditional course of litigation, would require approximately 150 judge years. ...Congress, by not creating any legislative solution to these problems, has effectively forced the courts to adopt diverse, innovative, and often non-traditional judicial management techniques to reduce the burden of asbestos litigation that seem to be paralyzing their active dockets.

State ex rel. Appalachian Power Co. v. MacQueen, 479 S.E.2d at 303-04 (citations omitted).

In his Administrative Order entered November 17, 2000, then-Chief Justice Elliot Maynard granted the Motion of Judges Recht and MacQueen to Refer all asbestos-related cases in West Virginia to the Mass Litigation Panel. *See* Administrative Order of the Chief Justice of the West Virginia Supreme Court of Appeals, entered November 17, 2000. The Chief Justice noted that the moving parties had moved "to refer over 25,000 asbestos cases pending before several

circuit courts of the State to the Mass Litigation Panel." Administrative Order, at ¶ 2, Findings of Fact. He further noted that the railroad defendants, who objected to the referral of their cases to the Mass Litigation panel, nevertheless "recognize that there are approximately 2,500 railroad cases that contain allegations of asbestos exposure." Administrative Order, at ¶ 11, Findings of Fact. Justice Maynard found that asbestos litigation in West Virginia constituted litigation "involving common questions of law or fact in mass accidents or single catastrophic events in which a number of people are injured" as contemplated by Trial Court Rule 26.01(c)(a) and granted the Motion to Refer.

Later, in *State ex rel. Allman v. MacQueen,* 551 S.E.2d 369 (W.Va. 2001) (per curiam), in which this Court considered objections of plaintiffs and defendants to the then-current asbestos litigation plan, this Court referred to "the managerial nightmare presented by what has been referred to as an 'elephantine mass of asbestos cases.'" *Allman,* 551 S.E.2d at 374.

Later still, in *State ex rel. Mobil v. Gaughan*, 563 S.E.2d 419 (W.Va. 2002), this Court again faulted Congress for its failure to establish an administrative system for dealing with asbestos litigation, and said:

> Due to the lack of any such alternate recovery mechanism, however, the state and federal judiciaries throughout this country have been forced, by default, to accept the "managerial nightmare" of dealing with, or being inundated by, an inestimable and seemingly endless number of asbestos cases.

State ex rel. Mobil v. Gaughan, 563 S.E.2d at 425.

It is facetious for Appellants to suggest, "there is no evidence that the West Virginia court system is overburdened" by asbestos litigation, Brief of Appellant, at 15, much less that it is not overburdened by asbestos litigation brought by non-resident plaintiffs whose causes of action did

not arise in West Virginia.[7] It is clear based upon the forgoing authority that W.Va. § 56-1-1(c) (2003) does not violate the Privileges and Immunities Clause of the United States Constitution as applied to these cases because West Virginia has a substantial interest in avoiding the burdens of foreign litigation and § 56-1-1(c) (2003) is narrowly tailored to address the State's obvious objective. Furthermore, the statute does not operate as a total exclusion of foreign litigation brought by non-residents but instead permits such plaintiffs who are otherwise foreclosed from litigating in West Virginia to litigate here if they can litigate nowhere else. W.Va. Code § 56-1-1(c) (2003).

In sum, this Court has, through the various cases and the Administrative Order cited above, authoritatively addressed and refuted the assertions and arguments of Appellants. In addition, this Court has answered the question of whether the federal Constitution's Privileges and Immunities clause would prevent West Virginia from enforcing the State's venue laws in foreign litigation brought by non-West Virginia residents, and determined that it would not.

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[7] Even counsel for these many Appellants has recognized in the lower court the burdens placed upon West Virginia's judicial system by asbestos litigation. This is shown by Motions for Mediation they have filed in similar FELA asbestos cases in the lower court in *In Re: FELA Asbestos Cases*, Circuit Court of Kanawha County, West Virginia, Civil Action No. 02-C-9500. In plaintiffs' "Motion to Refer Cases to Mediation," served June 23, 2005, counsel for Appellees complains, "[i]f these cases continue to be resolved as scheduled, at a rate of six per month, it will be many years, perhaps decades, before all of these cases are resolved through trial." A copy of that motion is included in the Addendum as Exhibit B. In Plaintiffs' "Supplemental Memorandum in Support of the Motion to Refer Cases to Mediation" served November 28, 2005, plaintiffs complain that at the rate the court was scheduling cases for trial, "...the backlog will be disposed of in approximately 39 years." *See* Exhibit C in the Addendum. Finally, in their recent "Renewed Motion to Refer Cases to Mediation" served November 30, 2007, Plaintiffs note that the motion applies to 1,400 cases, that 1,000 more plaintiffs have brought the instant appeal of the dismissal of their cases, and emphasize "the interests of judicial efficiency" as a reason the court should enter an order mandating court-supervised mediation. *See* Exhibit D to the Addendum.

B. SECTION 56-1-1(C)(2003) OF THE WEST VIRGINIA CODE DOES NOT VIOLATE THE "RIGHT TO OPEN COURTS" PROVISION OF ARTICLE III, SECTION 17 OF THE WEST VIRGINIA CONSTITUTION.

Appellants argue that "[t]he West Virginia Constitution guarantees that the courts of this State shall remain open to the Appellants' claims." Brief of Appellant, at 19. However, this Court has noted, "We also recognize that our "access-to-courts" or "open courts" constitutional provision, W.Va. Const. art. III, § 17, is not an absolute bar to our adoption of the common-law principle of *forum non conveniens*." *Gardner*, 372 S.E.2d at 793. This Court further noted in *Gardner*:

> The *Douglas* court also held that a state, with respect to access to its courts, may, without offending the privileges-and-immunities clause, distinguish between residents and nonresidents, as long as nonresident citizens of the state and nonresident noncitizens are treated the same. "A distinction of privileges according to residence [as opposed to citizenship] may be based upon rational considerations . . . . There are manifest reasons for preferring residents in access to often overcrowded Courts, both in convenience and in the fact that broadly speaking it is they who pay for maintaining the Courts concerned." *Id.* at 387, 49 S. Ct. at 356, 73 L. Ed. at 752.

Gardner, 372 S.E.2d at 790-91 (footnote omitted).

This Court established the test for determining whether a statute violates Art. III, §17 in *Lewis v. Canaan Valley Resorts*, 408 S.E.2d 634 (W.Va. 1991). That case involved a "facial challenge to the constitutionality of the West Virginia Skiing Responsibility Act, W.Va. Code, 20-3A-1 to 20-3A-8 [1984]." *Lewis*, 408 S.E.2d at 637. The plaintiff in that case argued that the Act violated W.Va. Const. Art. III, § 10 and U.S. Const. amend. XIV, § 1 ("equal protection"), W.Va. Const. Art. VI, § 39 ("special legislation"), and W.Va. Const. Art. III, § 17 ("certain remedy"). *Id.*

The plaintiff in *Lewis* was attempting to bring a tort claim against Canaan Valley Resort for injuries sustained while exiting a ski lift at the resort. *Lewis*, 408 S.E.2d at 637. The defendant relied on the West Virginia Skiing Responsibility Act (limiting the duties, responsibilities, and liabilities of ski resorts) in its defense. *Id.* The trial court granted the plaintiff's motion to strike the defense on all three points raised by the plaintiff. *Id.* This Court reversed and remanded, holding that the Act did not violate the constitutional provisions in question. The Court held that courts must use "every reasonable construction" in order to sustain a legislative enactment under the Constitution, and "any reasonable doubt must be resolved in favor of the constitutionality" of the legislation. *Lewis*, 408 S.E.2d at 640-41.

This Court referred to the "open courts provision" as the "certain remedy provision," and stated that both terms refer to Article III, Section 17 of the Constitution. *Lewis*, 408 S.E.2d at 641. This Court analyzed the provision's effect on its analysis of the constitutionality of the Act:

> While "we decline to hold that the certain remedy provision . . . has no meaning when it comes to legislative enactments[,]" *Gibson*,___W.Va. at___, S.E.2d at___, slip op. at 23, a couple of fundamental points are to be considered in arriving at the proper scope of this state's constitutional provision. First, this provision itself states that the "remedy" constitutionally guaranteed "for an injury done" to protected interests is qualified by the words, "by due course of law[.]" *See supra* note 3. **This language extends considerable latitude to the legislature.** Second, under *W.Va. Const.* art. VIII, § 13, the general authority of the legislature to alter or repeal the common law is expressly recognized. Moreover, even though a statute involves a complete bar to, or a substantial impairment of, a civil action to collect damages for personal injuries or property damage in certain circumstances, "the fact that there is court involvement does not alter the economic basis underlying the right to sue." *Gibson*,___W.Va. at ,_____S.E.2d at_____, slip op. at 5. **Thus, access to the courts is not a fundamental right in the sense that any limitation on that right requires "strict scrutiny" for purposes of the certain remedy provision.** *Meech v. Hillhaven West, Inc., 238 Mont. 21, 37-38, 776 P.2d 488, 498 (1989).*
>
> To give effect to the certain remedy provision, which recognizes the tension between the existing right of a person to a remedy for certain injuries,

> on the one hand, and, on the other hand, the legislature's power to alter or repeal that remedy by "due course of law[,]" this Court adopts the following two-part test, once it has been shown, pursuant to syllabus point 6 of *Gibson*, that the certain remedy provision "is implicated." **When legislation either substantially impairs vested rights or severely limits existing procedural remedies permitting court adjudication, thereby implicating the certain remedy provision of article III, section 17 of the *Constitution of West Virginia*, the legislation will be upheld under that provision if, first, a reasonably effective alternative remedy is provided by the legislation or, second, if no such alternative remedy is provided, the purpose of the alteration or repeal of the existing cause of action or remedy is to eliminate or curtail a clear social or economic problem, and the alteration or repeal of the existing cause of action or remedy is a reasonable method of achieving such purpose.** *See, e.g., Horton v. Goldminer's Daughter, 785 P.2d 1087, 1094 (Utah 1989)* (discussed in *Gibson*). *See also Smith v. Department of Insurance, 507 So. 2d 1080, 1088 (Fla. 1987); Lucas v. United States, 757 S.W.2d 687, 690 (Tex. 1988). Cf. O'Neil v. City of Parkersburg, 160 W.Va. 694, 700-01, 237 S.E.2d 504, 508 (1977)* (applying a "rational basis" test for equal protection analysis and suggesting same test under *W.Va. Const.* art. III, § 17 on "open courts"; protection of public coffers, by itself, however, without considering effect on tort victim, is not reasonable).

Lewis, 408 S.E.2d at 644-45 (emphasis added) (footnote omitted).

Under the two-part test applied in the *Lewis* case, the West Virginia Skiing Responsibility Act was found to implicate the open courts provision because it limited procedural remedies. The Act was upheld, however, because this Court found that the Act was designed to reduce a serious economic problem for ski operators and the State of West Virginia by limiting ski operators' unlimited liability. This Court further found that the Act was a reasonable method of achieving the goal of curtailing this problem.

In the instant case, it appears that while the statute may have "limited existing procedural remedies permitting court adjudication," the application of the statute by the trial court should be upheld because a "reasonably effective alternative remedy is provided by the legislation." The Appellants' claims are brought under the FELA, which provides the obvious alternative of

filing the action in federal court or in state court in the State where the cause of action arose. *See* 45 U.S.C. §56 (2003). If the filing of this case in these alternative fora is foreclosed, the statute provides the alternative remedy of returning to West Virginia and filing an affidavit showing that the case cannot be filed elsewhere. In addition, even if the court determines that no alternative remedy is provided, as discussed below, "the purpose of the alteration of the existing cause of action or remedy" (by the non-resident venue statute) is to "curtail a clear social or economic problem," and the alteration is a reasonable method of achieving such purpose.

Courts in West Virginia are dealing with overcrowded dockets. Trials specifically, and use of the courts generally, impose great costs. The application of the Non-Resident Venue Act to these cases reduced the overcrowding of West Virginia court dockets with foreign litigation brought by non-residents against non-West Virginia corporations and lessened the financial burden on the State, its citizens, and its resident litigants.

This Court, in considering the *forum non conveniens* doctrine, has given great weight to the social and economic problems imposed by foreign litigation on private litigants and on the public generally.

> Included among the private interests of the litigants are: the relative ease of access to sources of proof; the availability of compulsory process for the attendance of unwilling witnesses and the cost of obtaining the attendance of willing witnesses; the possibility of a view of property, if such a view would be appropriate in the action; the enforceability of any judgment; and all other practical problems that make a trial of a case easy, expeditious and inexpensive.
>
> The public interests include the relative congestion of the respective courts' dockets; the burden of imposing jury duty upon the citizens of a community which has no or very little relation to the litigation; the local interest in having localized controversies decided at home; and the advantages of conducting a trial in a forum familiar with the applicable law and of avoiding conflicts of law.

Tsapis, 400 S.E.2d at 243-3 (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947)).

These "interests" have no less force in analyzing the statute to which Appellants object, and require this Court to uphold the statute.

C. SECTION 56-1-1(C) OF THE WEST VIRGINIA CODE DOES NOT VIOLATE THE SEPARATION OF POWERS CLAUSE OF ARTICLE V, SECTION 1 OF THE WEST VIRGINIA CONSTITUTION

Appellants argue that only the Supreme Court of Appeals of West Virginia is empowered to promulgate rules affecting venue under the West Virginia Constitution. *See* Brief of Appellant, at 21. This Court has recognized that state statutes may affect venue so long as they do not conflict with the Court's rules of procedure:

> We have previously ruled that "venue is procedural and statutes relating thereto are so treated." *State ex rel. Chemical Tank Lines, Inc. v. Davis*, 141 W.Va. 488, 494-95, 93 S.E.2d 28, 32 (1956); *see also Hansbarger*, ___ W.Va. at ___, 351 S.E.2d at 70. Procedural statutes relating to venue, like West Virginia Code § 56-1-1, are effective only as rules of court and are subject to modification, suspension or annulment by rules of procedure promulgated by this Court. W.Va. Const. art. 8, § 3; 3 W.Va. Code § 51-1-4 (1981 Replacement Vol.); W.Va. Code § 51-1-4a (1981 Replacement Vol.). Ultimately, civil venue questions are governed by the procedural rules promulgated by this Court, the procedural statutes that are not inconsistent with those procedural rules, and the opinions issued by this Court interpreting those procedural rules and statutes.
>
> We are mindful that none of the provisions of the West Virginia Rules of Civil Procedure now attempt to modify the venue of actions in our circuit courts, and that limitations existing before promulgation of those rules should continue in existence. M. Lugar & L. Silverstein, West Virginia Rules 535 (1960). In this regard, Rule 82 states: "These rules shall not be construed to extend or limit the jurisdiction of the courts or the venue of actions therein." While it is true that West Virginia Code § 56-1-1 contains certain limitations as to the venue of actions, we are unable to ascertain from its provisions any language which addresses the question now before us.

State ex rel. Kenamond v. Warmuth, 366 S.E.2d 738, 740-41 (W.Va. 1988) (footnote omitted).

Because no West Virginia Rule of Civil Procedure purports to affect venue, the statute in question cannot be held invalid on the grounds of conflicting with them.

D. THERE IS NO REASON WHY A STATE STATUTE MAY NOT AUTHORIZE THE DISMISSAL OF A CIVIL SUIT BROUGHT BY A NON-RESIDENT FOR IMPROPER VENUE, WHEN WEST VIRGINIA COURTS CAN DO SO UNDER THE *FORUM NON CONVENIENS* DOCTRINE.

In 1989 this Court weighed whether to adopt the common law *forum non conveniens* doctrine in *Gardner*, where the Court noted, "The common-law principle of *forum non conveniens* is simply that a court may, in its sound discretion, decline to exercise jurisdiction, to promote the convenience of witnesses and the ends of justice, even when jurisdiction and venue are authorized by the letter of a statute." *Gardner*, 372 S.E.2d at 791. Although this Court refused to adopt the doctrine in *Gardner*, it stated that it could do so if it wished. Two years later, this Court expressly adopted the doctrine in *Tsapis*. In *Tsapis*, the Court explained that the choice of forum of a non-resident plaintiff may be overcome if the defendant can demonstrate "that the forum has only a slight nexus to the subject matter of the suit," and "that another available forum exists which would enable the cases to be tried substantially more inexpensively and expeditiously." *Tsapis*, 400 S.E.2d at 244. "A key consideration [in applying the doctrine of *forum non conveniens*] is the residence of the plaintiff, since the doctrine historically accords *preference* to the choice of the *resident* plaintiff." *Tsapis*, 400 S.E.2d at 243 (emphasis added). The Court has reiterated that the doctrine of *forum non conveniens* has continued vitality in cases, like the one at bar, where the alternative forum is outside this State. *See Riffle v. Ranson*, 464 S.E.2d 763, 770, n.11 (W.Va. 1995).

The Appellants in this case are not West Virginia residents. Appellants do not claim to have worked for CSX Transportation, Inc. or Norfolk Southern Railway Company in West

Virginia. Because Plaintiffs have no contacts with West Virginia, Plaintiffs' forum of choice is entitled to little if any deference. Justice Cleckley noted in *Cannelton Industries Inc. v. Aetna Casualty & Surety Company,* 460 S.E.2d 1 (W.Va. 1994), that the weight a court should give to a plaintiff's choice of forum is actually only that of a "preference." *Cannelton*, 460 S.E.2d at 7. Justice Cleckley notes with apparent approval the United States Supreme Court's *Piper Aircraft* opinion, in which it was stated:

> [T]he District Court's distinction between resident or citizen plaintiffs and *foreign plaintiffs* is fully justified. In *Koster*, the Court indicated that a plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen his home forum.

Cannelton, 460 S.E.2d at 7 n.9 (emphasis added). Thus, the apparent deference to plaintiffs' choice of forum cited in *Tsapis* was significantly weakened.

West Virginia accords only this mere "preference" to even a West Virginia resident's forum choice, and a defendant "may overcome this preference by demonstrating that the forum has only a slight nexus to the subject matter of the suit...." *Tsapis*, 400 S.E.2d 239 (W.Va. 1990). Of course, Appellants in the instant appeal stipulated that they are not residents of West Virginia and that their causes of action arose elsewhere. Thus West Virginia has less than even a "slight nexus" to their claims.

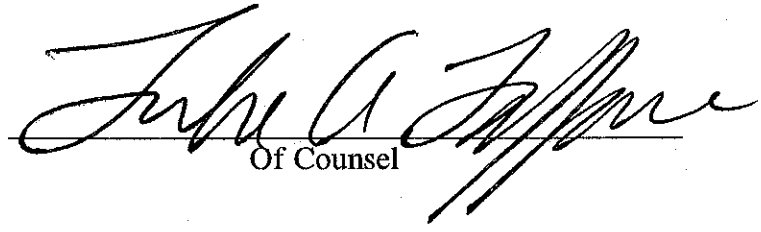
The non-resident venue provisions of W.Va. Code § 56-1-1(c) (2003) were not dissimilar to the factors West Virginia courts must consider to determine whether to grant a motion to dismiss under the *forum non conveniens* doctrine. Appellants offer no explanation

why state courts may under West Virginia common law dismiss foreign litigation brought by non-residents, but may not do the same under a West Virginia statute.[8]

V. CONCLUSION

WHEREFORE, Appellees, CSX Transportation, Inc. and Norfolk Southern Railway Company respectfully request the Court to affirm the judgment below.

CSX TRANSPORTATION, INC. and
NORFOLK SOUTHERN RAILWAY COMPANY



Of Counsel

Luke A. Lafferre
West Virginia State Bar No. 2122
Alicia A. Deligne
West Virginia State Bar No. 10343
HUDDLESTON BOLEN LLP
611 Third Avenue
P.O. Box 2185
Huntington, WV 25722-2185
(304) 529-6181

Counsel for Appellees
CSX Transportation, Inc. and
Norfolk Southern Railway Company

[8] The Court should note that the amended venue statute, W.Va. Code § 56-1-1a (2007), essentially codifies the common law *forum non conveniens* doctrine, and requires courts to consider the dismissal of foreign litigation brought by non-residents under that particular state statute.